

**National Advisory Committee
to the U.S. Representative to the
Commission for Environmental Cooperation**

April 29, 2002

The Honorable Christine Todd Whitman
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue
Washington, D.C. 20460

Dear Governor Whitman:

I am writing on behalf of the National Advisory Committee (NAC) to the U.S. Representative to the North American Commission for Environmental Cooperation (CEC) with respect to a notice published on March 12 by the Joint Public Advisory Committee (JPAC) of the CEC. That notice requests public input on the requirement for the Secretariat to provide the Parties with its work plans and the opportunity to comment on them. On behalf of the NAC, I respectfully request you to forward this letter to the JPAC not later than April 30, 2002, which is the closing date identified in the March 12 notice.

The NAC has considered the integrity of the citizen submission process extensively in its previous meetings, and our earlier advice reflects the Committee's commitment to maintaining the consistency and transparency of the process. The Committee's advice of May 24, 2001 stated that we recommend that the U.S. government maintain its position to support the preparation of factual records "to the greatest extent practicable" when the Secretariat finds that a factual record is warranted.

During its most recent meeting on October 4 and 5, 2001 in Washington, the NAC received a briefing from representatives of the EPA Office of International Activities and its Office of General Counsel on the status of the citizen submission process generally, and the pending Migratory Bird Treaty Act (MBTA) submission concerning the United States in particular. In our subsequent advice letter of October 15, 2001, we noted our concern that the United States was proposing a conditional approval of the MBTA submission that would confine the CEC Secretariat to investigating the particular events that were identified in the submission as illustrative examples. The Committee also expressed its concern that the proposed U.S. response would require the Secretariat to submit a work plan to the United

States for approval. The present comment draws on and elaborates the October 15 letter strictly on this latter point.

Five Council resolutions adopted on November 16, 2001 contain language directing the Secretariat to provide the Parties with its work plan for preparing a factual record and to provide the Parties with the opportunity to comment on that plan. This appears to be a new development in the Council's practice, not expressly authorized by the North American Agreement on Environmental Cooperation (NAAEC).

We understand that the Secretariat's prior practice has been to prepare work plans for factual submissions and generally to make them available, but not to solicit formal comment from the Parties. This to us seems a reasonable and workable solution. Otherwise, express and unilateral input by individual Parties into the process of drafting a work plan tends to undermine both the appearance and actuality of independence on the part of the Secretariat, an attribute that is fundamental to the integrity of the Article 14/15 process. Moreover, the NAAEC in Article 15 already requires the Secretariat to submit draft factual records to Council so that Parties may comment on their accuracy and requires the Secretariat to take into account information furnished by the Parties.

Lacking express authorization in the NAAEC, unilateral input by any one of the Parties into the content of a work plan appears to be contrary to the text of the Agreement, which provides in Article 11(4) that

In the performance of their duties, the Executive Director and the staff shall not seek or receive instructions from any government or any other authority external to the Council. Each Party shall respect the international character of the responsibilities of the Executive Director and the staff and shall not seek to influence them in the discharge of their responsibilities.

Through unilateral comments on a particular work plan, any one of the Parties may run afoul of this provision. Where the drafters of the NAAEC anticipated such country-specific input, as on draft factual records as specified in Article 15(4) & (5), departures from the general principle of article 11(4) are expressly enumerated.

Nor does individual comment by Parties on draft work plans for factual records appear to be a workable practice. In an extreme case, a single Party could unilaterally confine the scope of a factual record through this channel. It is even possible that comments from different Parties could conflict with each other. Instead of inviting unproductive disagreement over the appropriate scope of comments from Parties, we believe that this practice should be discontinued altogether.

In sum, the NAC regards recent decisions by the Council to be totally unacceptable and contrary to both the spirit and letter of Article 11(4), coming just two years after similar

attempts by the Council to revise the Article 14/15 Guidelines without public review. The changes made through the Council's decisions would invite political influence. Even if there is no such influence, there is inevitably a perception that political influence may affect the operation, effectiveness, and integrity of the citizen submission process.

In addition to transmitting this letter to the JPAC, we appreciate it if you were to forward this letter to other agencies involved in the interagency process regarding the Article 14/15 process.

Cordially,

David A. Wirth
Acting Chair
National Advisory Committee

cc: Judith Ayers, Assistant Administrator for International Activities
Denise Ferguson-Southard, Chair, U.S. Governmental Advisory Committee
Jonathan Plaut, Chair, Joint Public Advisory Committee
Jean Perras, Chair, Canadian National Advisory Committee
Mateo Castillo Ceja, Chair, Mexican National Advisory Committee
U.S. National Advisory Committee